

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

In re: PHARMACEUTICAL INDUSTRY)
AVERAGE WHOLESALE PRICE)
LITIGATION) MDL No. 1456
) Civil Action No. 01-12257-PBS
)
THIS DOCUMENT RELATES TO:) Hon. Patti B. Saris
)
*United States of America ex rel. Ven-a-Care of) Magistrate Judge Marianne B. Bowler
the Florida Keys, Inc., et al. v. Boehringer)
Ingelheim Corporation, Inc., et al., CIVIL)
ACTION NO. 07-10248-PBS)*

**UNITED STATES' CROSS-MOTION FOR
PARTIAL SUMMARY JUDGMENT**

The United States opposes the motion for summary judgment filed by defendants Boehringer Ingelheim Roxane, Inc., Roxane Laboratories, Inc., Boehringer Ingelheim Pharmaceuticals, Inc. (“BIP”), and Boehringer Ingelheim Corporation (collectively “Roxane”) (Master Document No. (“MD#”) 6199, Subcategory No. (“Sub.#”) 256). The United States further cross-moves for partial summary judgment under the False Claims Act (“FCA”), 31 U.S.C. §§ 3729-3733, against defendants Boehringer Ingelheim Roxane, Inc., and Roxane Laboratories, Inc. that (1) Roxane’s reported average wholesale prices (“AWPs”) for the Subject Drugs were false; (2) Roxane “knowingly” reported such false prices under the FCA; (3) Roxane’s false AWPs for its ipratropium bromide product caused false claims to be submitted to the Medicare program; (4) Roxane’s false AWPs for the Subject Drugs constituted false statements and caused the submission of false claims to the Medicaid program and caused the State programs to submit false claims to the federal government for federal monies; and also that (5) Roxane’s Eleventh Affirmative Defense of failure to mitigate and consent does not

absolve Roxane of liability under the FCA.

The United States is filing an accompanying brief detailing issues of law that are common to the three cases in which the United States intervened, as well as a “common” L.R. 56.1 Statement of Undisputed Facts.¹ In opposition to Roxane’s Motion for Summary Judgment and in support of its own motion, the United States files the accompanying Consolidated Memorandum of Law, focusing on applying the law to the facts in the Roxane case. The United States also submits its Response to the Corrected Roxane Local Rule 56.1 Statement; Declaration of James J. Fauci transmitting Document Relied On in the United States’ Cross-Motion for Summary Judgment; and the United States’ Local Rule 56.1 Statement of Undisputed Material Facts of Record.

WHEREFORE the United States² asks that this Motion be granted and that the Court grant summary judgment in favor of the United States that:

- (1) Roxane’s reported average wholesale prices (“AWPs”) for the Subject Drugs were false;
- (2) Roxane “knowingly” reported such false prices under the FCA;
- (3) Roxane’s false AWPs for its ipratropium bromide product caused false claims to be submitted to the Medicare program;
- (4) Roxane’s false AWPs for the Subject Drugs constituted false statements and caused the submission of false claims to the Medicaid program and caused the State programs to submit false claims to the federal government for federal monies; and
- (5) Roxane’s Eleventh Affirmative Defense of failure to mitigate and consent does not absolve Roxane of liability under the FCA.

¹The common brief pertains to the instant case and *United States ex rel. Ven-a-Care of the Florida Keys, Inc., v. Abbott Laboratories, Inc.*, Civil Action No. 06-11337-PBS (D. Mass.); and *United States ex rel. Ven-A-Care of the Florida Keys, Inc. v. Dey, Inc., et al.*, Civil Action No. 05-11084-PBS (D. Mass.). The United States also has filed a “common” L.R. 56.1 Statement of Facts.

²Relator Ven-A-Care of the Florida Keys, Inc. joins this Motion and accompanying brief.

DATED this 24th day of July, 2009.

Respectfully submitted,

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By: /s/ Barbara Healy Smith

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused an electronic copy of the above “MEMORANDUM IN SUPPORT OF UNITED STATES’ MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO THE DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT” to be served on all counsel of record via electronic service pursuant to Paragraph 11 of Case Management Order No. 2 by sending a copy to LexisNexis File & Serve for posting and notification to all parties.

/s/ James J. Fauci
JAMES J. FAUCI
Assistant U.S. Attorney

Dated: July 24, 2009

RULE 7.1 CERTIFICATION

The undersigned counsel certifies pursuant to Local Rule 7.1(a)(2) that he has conferred with counsel for Relator and the Defendants on the issues raised in this motion, and the parties were unable to agree.

/s/ James J. Fauci
JAMES J. FAUCI
Assistant U.S. Attorney
Department of Justice

Dated: July 24, 2009